UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DONALD L. PALMER,
Petitioner,

-V-

Case No. C-1-00-882
Judge Weber
Magistrate-Judge Merz

MARGARET A. BAGLEY, Warden,
Respondent.

PETITIONER'S OBJECTIONS TO
REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Pursuant to Fed.R.Civ.P. 72, Petitioner lodges specific objections to the proposed findings and recommendations of the Magistrate Judge filed December 16, 2005, for the reasons set forth in the accompanying memorandum.

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

On December 16, 2005, Magistrate Judge Merz filed a report and recommendation that Donald L. Palmer's petition for habeas corpus relief be denied. Petitioner does not object as to the Report and Recommendation's disposition of Claims for Relief 1, 5, 13, 14, and 16. Below Petitioner sets forth the reasons why the Court should not adopt the report and recommendation as to the other Claims for Relief.

II. STANDARD OF REVIEW

Reconsideration of a magistrate's report and recommendation is governed by 28 U.S.C. §636(b)(1). According to its provisions, a judge may assign a magistrate the responsibility of making proposed findings of fact and recommending the disposition of certain "dispositive" motions, including motions for summary judgment. 28 U.S.C. §636(b)(1)(B). Should a party object to these proposed findings and recommendations, the judge must make a de novo determination on the contested portions. 28 U.S.C. §636(b)(1); U.S. v. Raddatz, 447 U.S. 667, 673-74(1980); Roland v. Johnson, 856 F.2d 764, 769 (6th Cir. 1988). Failure to do so constitutes reversible error. E.E.O.C. v. Keco Industries, Inc., 748 F.2d 1097, 1102 (6th Cir. 1984). In conducting a de novo review, the judge is

free to accept, reject, or modify any of the magistrate's findings and recommendations. 28 U.S.C. §636(b)(1); Raddatz, 447 U.S. at 673-74, 680. With the correct standard of review in mind, Petitioner now turns his attention to the merits of the specific objections

III. Objections

1. SECOND CLAIM FOR RELIEF: PETITIONER OBJECTS TO THE MAGISTRATE JUDGE'S RECOMMENDATION DENYING RELIEF AS TO PETITIONER'S CLAIM THAT HIS CONVICTION FOR AGGRAVATED MURDERS AND THE RESULTING DEATH SENTENCES ARE CONTRARY TO AND AN UNREASONABLE APPLICATION OF THE CONCLUSION OF LAW ANNOUNCED BY THE UNITED STATES SUPREME COURT IN *IN RE: WINSHIP*, 397 U.S. 358, 364 (1970) AND WERE OBTAINED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE EVIDENCE INTRODUCED BY THE STATE FAILED TO ESTABLISH THAT PETITIONER ACTED WITH PRIOR CALCULATION AND DESIGN.

A. Insufficient Evidence to Support Aggravated Murder Convictions.

On May 23, 1989, Petitioner was indicted for two counts of aggravated murder under ORC 2903.01(a) (prior calculation and design), two counts of aggravated murder under ORC 2903.01(b) (felony-murder) and two counts of aggravated robbery under ORC 2911.01(a)(2), each with

firearm specifications under ORC 2929.271.

In his Second Claim for Relief the record in this case establishes that Petitioner's conviction and death sentence are constitutionally void as the state failed to offer sufficient to prove that Petitioner acted with prior calculation and design. The State failed to offer constitutionally sufficient evidence to support Appellant's conviction or two counts of aggravated murder under ORC 2903.01(a), one count for each victim, Mr. Sponhaltz and Mr. Vargo. 2903.01(A) provides in relevant part that "no person shall purposely, and with ***prior calculation and design***, cause the death of another." (Emphasis added). The paucity of the State's evidence in this regard is exposed by Justice Pfeiffer's concurring opinion in Mr. Palmer's direct appeal. Justice Pfeiffer initially notes,

> "Neither the degree of care nor the length of time the offender takes to ponder the crime before hand are critical factors in themselves, but they must amount to *'more than momentary deliberation.'"* (Emphasis added).

State v. Palmer, (1997), 80 Ohio St.3d 543, 577-578, quoting Legislative Committee Note (1993) (Pfeiffer, J., concurring). The record demonstrates that this standard has not been met.

B. The Magistrate's Decision

The Magistrate recommends rejecting this claim by deciding incorrectly that the Ohio Supreme Court's resolution of this claim by the Ohio Supreme Court was not contrary to nor an unreasonable application of federal law finding that Petitioners argument depends entirely on Petitioner's version of the evidence. Doc. 103, p. 18. The discussion below demonstrates that the Magistrate Judge is in error and that, as Justice Pfeiffer concluded the record read most favorably to the prosecution fails to establish prior calculation and design as those elements are defined by the Ohio law.[1]

C. Petitioner is Entitled to Relief as to His Second Claim

In weighing the evidence regarding prior calculation and design, giving the benefit of the doubt to the prosecution, Justice Pfeiffer found the evidence clearly lacking.

> In this case, the prosecution failed to prove beyond a reasonable doubt that the killings of Sponhaltz and Vargo were the product of prior calculation and design. The murders were not the result of `studied care in planning or analyzing the means of the crime.' Rather, they were the result of a ***spur of the moment decision*** by Palmer to kill two total strangers. Accordingly, I would dismiss Counts I

[1]This Court has previously found that this ground has not been procedurally defaulted. (Decision, Doc. 61, adopting Report and Recommendation, Doc. 50, where the Court found that no procedural default defense had been raised as to this Claim for Relief. (Doc. 50, p.10). And see Doc. 103, p. 16.

> and IV. (Emphasis added).

Id. at 578.

The Ohio Supreme Court has adopted the following factors which are critical to a determination of whether sufficient evidence of prior calculation and design exists.

> (1) Did the accused and the victim know each other, and if so, was that relationship strained?
> (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and
> (3) Was the act drawn out or `an almost instantaneous eruption of events'?

State v. Taylor, (1997),78 Ohio St.3d 15, 19, quoting in part *State v. Jenkins,* (1976), 48 Ohio App.2d 99, 102). In this case, based on the undisputed record, each of those factors must be answered in the negative: (1) there was no evidence that Petitioner knew either of the victims; (2) there is no evidence that Petitioner knew he would encounter two strangers through the fortuity of an auto accident with a vehicle he was not driving and thus could not have given prior thought to either a murder weapon or a site; and (3) as Justice Pfeiffer noted the event was spur of the moment decision. It follows that under the *Taylor* and *Jenkins* decisions, the element of prior calculation and design is not supported by

record. Thus, "every fact necessary to constitute the crime with which [Petitioner] has been charged" has not been established beyond a reasonable doubt in violation of Petitioner's right to Due Process. *Jackson v. Virginia,* 443 U.S. 307, 315 (1979).

In adopting those factors, the Ohio Supreme Court recounted the legislative history underlying changes in the law:

> ORC 2903.01 `restates the former crime of premeditated murder so as to embody the classic concept of a ***planned***, cold-blooded killing while discarding the notion that ***only an instant's prior deliberation*** is necessary.' . . . (Citations omitted).

State v. Taylor, at 19. As the Supreme Court further explained,

> The phrase `prior calculation design' [was employed] to indicate ***studied care in planning or analyzing the means of the crime*** as well as a scheme encompassing the death of the victim. Neither the degree of care nor the length of time are critical factors in themselves, but they must amount to more than ***momentary deliberation***. (Internal quotations omitted) (Emphasis added).

Id. Again, the facts set out above confirm that there could not have been a "planned" killing nor could there be "studied care in planning or analyzing the means of the crime." What occurred here was, in fact, nothing more than "instantaneous eruption of events" that neither the Petitioner nor the victims could have possibly anticipated.

The Ohio Supreme Court reaffirmed its holding in *State v. Cotton*, (1978), 56 Ohio St.2d 8, where the Court held that "`prior calculation and design' is a more stringent element than the `deliberate and premeditated malice' which was required under prior law." (*Id*., quoting *Cotton,* syllabus, para. 1). Also in *Cotton*, the Court held that "instantaneous deliberation is not sufficient to constitute `prior calculation and design.'" *Id*., syllabus, para. 2.

There is no logical way the facts of this case can be fairly distinguished from the facts of *State v. Jenkins*, (1976), 48 Ohio App.2d 99. In *Jenkins*, the Court held that there was insufficient evidence of prior calculation in light of facts strikingly similar to those in the case at bar:

> The defendant was standing in the street next to his parked car talking to some friends when Mr. Kosman, the victim, drove by. Kosman was intoxicated and told the defendant, in effect, to get out of the street. The defendant responded by telling Kosman to pull his car over, which he did. The defendant then walked to his car and took a 'pump' shotgun out of the trunk. He walked to the front of his car and fired one shot into the trunk of Kosman's car. The evidence is in conflict as to whether Kosman was in the car or just getting out when the first shot was fired. Kosman moved toward the defendant (who was about 25 feet away) and was shot, spun around, and was shot again. The defendant then got into his car and drove off.

Id. 48 Ohio App. 2d at 100. The evidence was found to be insufficient to support an aggravated murder charge *Id.* 48 Ohio App. 2d at 103.

The same must be true here. Mr. Palmer exited Hill's vehicle to assist his friend who he believed was being accosted by the victim and discharged his weapon into the victim's head when he swung at the victim with a loaded gun. Almost immediately, he backed up and was surprised by the second victim whom he shot in a state of confusion. In the case at bar, like the facts in *Jenkins*, there is no dispute that Mr. Palmer did not know the victims, nor is it in dispute that the encounter on the roadside was purely random, nor is there any evidence to rebut Petitioner's evidence that the shootings occurred in a "spontaneous eruption of events" which were clouded by Mr. Palmer's panic and confusion. See also *State v. Davis*, (1982), 8 Ohio App.3d 205 (where evidence that the owner did not go to the bar with intent to shoot, that an argument developed with the owner and doorman and that the shooting occurred during a tussle, was insufficient evidence of prior calculation and design).

It is beyond argument that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is charged." *In Re: Winship,* 397 U.S. 358, 364, (1970). Having clearly failed to establish the elements of prior calculation and design with respect to the two aggravated

murder counts brought against Mr. Palmer under ORC 2903.01(A), those convictions cannot stand. It cannot honestly be said that viewing this evidence in the light most favorable to the prosecution, that any rational trier of fact could have found the essential elements of aggravated murder to have been established beyond a reasonable doubt. Justice Pfeiffer was correct in his evaluation of the evidence. Petitioner's conviction on these counts in the absence of adequate evidence clearly violates his rights as protected by the Due Process Clause of the Fourteenth Amendment. The decisions of the Court of Appeals and Ohio Supreme Court to the contrary, is an unreasonable application and contrary to established Supreme Court precedent expressed in In Re: Winship.

D. The Death Sentence Imposed by the Court is Constitutionally Infirm and Must be Vacated As the Violation Cannot be Considered Harmless.

The United States Supreme Court's decisions in *In re Winship* and *Jackson* make it quite clear that the state's failure to establish every element of the charge beyond a reasonable doubt deprives Petitioner for fundamental Due Process. There can be no doubt that this error unconstitutionally infected the sentencing process since the jury was instructed to weigh two impermissible aggravators. "In a weighing state

when a court invalidates one of the aggravators, it has removed a mass from one side of the scale. There is no way to know if the jury's analysis--how the aggravating and mitigating circumstances balanced--would have reached the same result even without the invalid factor. *Stringer*, 503 U.S. at 231-32, 112 S.Ct. 1130." *Coe v. Bell,* 161 F.3d 320, 334 (6th Cir. 1998).

Recognizing its vulnerability on the lack of evidence to support the aggravated murder convictions, the State argues in its Return of Writ that the conviction and sentence should still stand because "Palmer also received two felony murder convictions, which support his resulting death sentence." Other than repeating Justice Pfeiffer's statement to this effect in his concurring opinion, Respondent cites no authority for this position.

First, the sentencing jury and trial court weighed all the aggravating factors against all the mitigating factors. There is no way to tell from either the verdict of the jury or the trial court's opinion what effect this weighing of the aggravating factors against the mitigating circumstances would have on the ultimate determination if two of the primary charges were invalidated.

> In a weighing state . . . when a court invalidates one of the aggravators, it has removed a mask from one

> side of the scale. There is no way to know if the jury's analysis–how the aggravating and mitigating circumstances balanced–would have reached the same result even without the invalid factor.

Coe v. Bell, 161 F.3d 320, 334 (6th Cir. 1998), cert. denied. 528 U.S. 842. As the Supreme Court has held,

> When the sentencing body is told to weigh an invalid factor in its decision, a reviewing Court may not assume that it would have made no difference if [that factor] had been removed from the death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or re-weighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer v. Black, 503 U.S. 222, 232 (1992). Since, as Justice Pfeiffer properly concluded, there is insufficient evidence to support the aggravated murder (prior calculation and design) convictions, it necessarily follows that the sentencing jury and sentencing judge considered invalid aggravating factors in weighing the aggravating factors against mitigating factors. Consequently, consistent with *Stringer*, this Court must vacate the death sentences and remand the case to the state court for a proper re-weighing of the factors or a constitutional harmless-error analysis. Contrary to the suggestion made by Respondent in the Return of Writ, the re-weighing or constitutional harmless-error analysis must be done by the state appellate or trial courts, not by this Court. This conclusion is apparent from the

Supreme Court's discussion in *Stringer*.

> In order for a ***state appellate court*** to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor. Otherwise, the defendant is deprived of the precision that individual consideration demands under the *Godfrey* and *Maynard* line of cases. (Citations omitted). (Emphasis added).

Stringer, 503 U.S. at 230-231. The Supreme Court confirms the necessity of sending the case back to the state judicial decision for further review with its ultimately holding in the case.

> Use of a vague or imprecise aggravating factor in the weighing process ***invalidates the sentence*** and at the very least requires constitutional harmless-error analysis or re-weighing ***in the state judicial system.*** (Emphasis added).

Stringer, 503 U.S. at 237. Thus, contrary to the argument of Respondent, the Supreme Court has made it crystal clear that the harmless-error analysis or the re-weighing must occur within the state judicial system which sentenced the Petitioner. Consistent with *Stringer*, therefore, the Court's only option is to vacate the death sentence and return the matter to the state court system for the re-weighing or harmless-error analysis.

Petitioner is aware that the Sixth Circuit has determined that, while a

Federal Court cannot engage in the re-weighing of aggravating factors, it may conduct the constitutional harmless-error analysis. *Coe v. Bell*, 161 F.3d 320, 335 (6th Cir. 1998). In Petitioner's view, that holding clearly contradicts the mandate of *Stringer*. Nevertheless, Petitioner will address the harmless-error analysis. In *Coe*, the Court found that the error was harmless because the jury apparently made a specific finding that the killings involved torture, a circumstance not present in the case at bar.

In Mr. Palmer's case, the jury and sentencing judge considered aggravating factors under the two primary aggravated murder counts with respect to which Petitioner has demonstrated, and Justice Pfeiffer has agreed, that there is insufficient evidence to support those convictions. There is no way to discern from the jury's verdict or the trial court's acceptance of the jury's recommendation, what the decision would have been had the aggravating factors under these two primary aggravated murder counts been removed from the weighing process. The trial court, in accepting the recommendation of the jury, simply states that "the aggravating circumstances the Defendant was found guilty of committing do outweigh the mitigating factors as to Counts I, III, IV and VI of the Indictment." (Mit. Tr. p. 174). Given the record in this case, the death

sentence has clearly been "infected" by constitutionally invalid aggravating factors, thus requiring a vacating of the death sentence and a remand to the state courts for re-weighing, a principle endorsed in *Coe*. *Coe*, 161 F.3d at 235. That the sentencing process was infected is made clear both by the lack of evidence to support the aggravated murder (prior calculation and design) convictions as well as the lack of evidence supporting the aggravating murder (felony murder) convictions, as Petitioner has demonstrated above.

Even if the Court engages in a full blown "harmless-error analysis," the result would be the same. First, it must be emphasized that the errors discussed under the second claim for relief, combined with the other errors demonstrated in this traverse, present that "unusual" case where there is an "especially egregious error of a trial type, or one that is combined with a pattern of prosecutorial misconduct, [that] might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 638, f.n. 9 (1993). Yet, even if this Court applies the harmless-error standard enunciated in *Brecht*, the record demonstrates that the jury and trial judge's improper consideration of aggravating factors under the

aggravated murder counts did, in fact, have a "substantial and injurious affect or influence in determining the jury's verdict." *Id*. Since there is insufficient evidence to support the aggravated murder convictions relating to prior calculation and design, the aggravating factors associated with those convictions could not properly be weighed by the jury. As previously mentioned, it is clear that the jury simply aggregated all of the aggravating factors and weighed them against the mitigating circumstances. The trial judge followed suit. Under these circumstances, it cannot reasonably be found that, removing these improper aggravating factors, for which there was insufficient evidentiary support, from the weighing process would not have affected the jury's decision to recommend the death penalty or the trial court's decision to impose that penalty. Accordingly, the death sentence must be vacated.

1. Petitioner's Indictment Failed to Include All of the Essential Elements of Aggravated Murder.

Prior to June 30, 1998, Ohio's aggravated murder statute R.C. § 2903.01 provided in relevant part:

> (A) No person shall purposely, and with prior calculation and design, cause the death of another. . .
>
> (B) No person shall purposely cause the death of another . . . while committing or attempting to commit an [enumerated felony]

* * *

> (E) No person shall be convicted of aggravated murder unless the person is specifically found to have intended to cause the death of another . . . . the prosecution must prove the specific intent of the person to have caused the death . . . beyond a reasonable doubt.

The requirement contained in former R.C. § 2903.01(E) that an aggravated murderer must have the "specific intent to cause the death of another" is an element of all aggravated murder offenses occurring prior to June 30, 1998. That is because the General Assembly used the language "No person shall be **convicted** of aggravated murder unless the person is specifically found to have intended to cause the death of another" instead of the language "No person shall be **sentenced** of aggravated murder unless the person is specifically found to have intended to cause the death of another" that specific intent is an element rather than a sentencing factor. The inclusion of the element contained in the aggravated murder statute (R.C. § 2903.01(E)) that the offender have the "specific intent to cause the death of another" is legally significant because it creates a separate offense from that of R.C. § 2903.02 murder that calls for a separate penalty.

In accordance with *Winship*, the Due Process Clause protects the

accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Id., at 364. Thus, the Due Process Clause of the Fourteenth Amendment [and the incorporated notice guarantees of the Sixth Amendment][2] require that the element (specific intent to cause the death of another) authorizing an increase in the maximum prison sentence for the offense of murder to the sentence available for the offense of aggravated murder must be (1) formally charged and (2) established on the basis of proof beyond a reasonable doubt. The incorporated notice guarantees have their genesis in the case of *Stirone v. United States,* 361 U.S. 212, 218 (1960). *Stirone* stands for the proposition that where a defendant has been has convicted of a crime and where a grand jury never charges the defendant with an essential element of that crime, a constructive amendment of the indictment has occurred. A constructive amendment may be prejudicial per se. *Browning v. Foltz*, 837 F.2d 276, 280 (CA6 1988), cert. denied 488 U.S. 1081.

In Mr. Palmer's case, the murder charges contained in the indictment did not contain the essential element that the defendant had the

[2] "In all criminal prosecutions, the accused shall . . . . be informed of the nature and the cause of the accusation . . ."

"specific intent to cause the death of another." (Joint Appendix Vol. V, pp.8-12). Since the indictment did not contain this essential element and the Palmer was convicted of aggravated murder, a constructive amendment has occurred. Thus, the constitutional requirement of formal notice of every element necessary to constitute the offense of conviction has not been met. The indictment is, therefore, void with respect to the charge of aggravated murder because the absence of the element (specific intent to cause the death of another) from the indictment deprived the trial court of subject-matter jurisdiction over aggravated murder. The indictment only vested subject-matter jurisdiction over the offense of murder. As a result, Palmer was only convicted of the offenses of murder. In such a situation, the remedy is to re-sentence the defendant to the penalties available for murder.

In addition, the element that Palmer have the "specific intent to cause the death of another" was not submitted to the jury to be proved beyond a